No. 1066

CITY OF PHOENIX, ARIZONA, and MILTON H. GRAHAM, FRANK G. BENITES, CHARLES A. JOHN J. LONG, MILTON SANDERS, MRS. DOROTHY THIELKAS, DR. MORRISON F. WARREN, members of and constituting the City Council of Phoenix, Arizona,

Appellants,

versus

EMILY KOLODZIEJSKI,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Appellee's Brief

Respectfully submitted,

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INDEX

	Page
Summary of Argument	1
Argument	2

TABLE OF STATUTES

Arizona Constitution, Article 7, Section 13	10
Article 9, Section 8	14
Title 35, Article 3, Section 3, Arizona Revised Statutes	11
Section 15.696.01, Arizona Revised Statutes	12
Section 35-455, Arizona Revised Statutes	11
Section 36-1242, Arizona Revised Statutes	13
Section 42-227, Arizona Revised Statutes, as amended	16
Section 42-136, Arizona Revised Statutes, as amended	16

TABLE OF LAW REVIEW ARTICLES

87 Harv. L. Rev. 80	19
67 Mich. L. Rev. 1260	18
117 U. Pa. L. Rev. 599	18

TABLE OF BOOKS

The Peralta Grant; James Addison Reavis and The Barony of Arizona	17

TABLE OF CASES

Allison v. City of Phoenix, 44 Ariz. 66, 33 P. 2d 927 13

Arizona State Highway Commission v. Gary Nelson, Attorney General, 459 P.2d 509 11

Avery v. Midland County (1968), 390 U.S. 474, 20 L.Ed.2d 45, 88 S.Ct. 1114 8

Baker v. Carr (1962), 369 U.S. 186, 7 L.Ed.2d 663, 82 S.Ct. 691 7

Baker, Watts v. Saxon, 261 F. Supp. 247 13

Bates v. Little Rock (1960), 361 U.S. 516, 4 L.Ed.2d 480, 80 S.Ct. 412 7

Braunfeld v. Brown (1961), 366 U.S. 599, 6 L.Ed.2d 563, 81 S.Ct. 1144 5

Cipriano v. City of Houma, et al, 286 F. Supp. 823 9

Cipriano v. City of Houma, et al, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 ..... 1, 2, 3, 4, 8, 9, 10, 12, 18, 19

Korematsu v. the United States, 323 U.S. 214 (1944), 89 L.Ed. 194 5

Kramer v. Union Free School District No. 15, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 ..... 1, 2, 3, 4, 8, 9, 10, 14, 15, 18, 19

Sherbert v. Verner, 374 U.S. 398 (1963), 10 L.Ed.2d 965, 83 S.Ct. 1790 6

Skinner v. State of Oklahoma, 316 U.S. 536, 86 L.Ed. 1655 (1942) 5

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1969

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SUMMARY OF ARGUMENT

I.

The Court should not, as Appellants argue, recede from the position adopted last term and restrict the rules set forth in *Kramer v. Union Free School District* and readopted in *Cipriano v. City of Houma* to the facts of those cases. The *Kramer* case specifically distinguishes voter qualifications from the right to vote in special elections. The Court applied the more stringent rule that in order to abridge basic freedoms, the state must show a compelling state interest. This rule should not be limited to revenue bond elections

nor elections in third-class school districts in New York but should be given general application throughout the Nation.

II.

In Part II, Appellants contend that the City's election meets the test set forth in *Kramer* and that the State of Arizona has a compelling state interest. It is the position of the Appellee that the state has not shown the compelling state interest, that the Appellee is just as interested in the outcome of the election as real property taxpayers and that the Appellee pays her share of the general obligation bond issue through her rent and the excise taxes paid to the City of Phoenix.

III.

Appellant's third point goes to the date for application of the *Cipriano* decision. Appellants argue that the *Cipriano* decision should be applied only after the date of the City's June 10th election. We counter with the argument that the date for application of the *Cipriano* decision in Arizona is the date for the canvass, the canvass having occurred after the *Cipriano* decision. The June 10, 1969, election of the City of Phoenix was not legally complete at the date of the *Cipriano* decision, and is specifically within the application of *Cipriano*.

I.

ARGUMENT

Appellants' position in Part I of its argument consigns both *Kramer*[1] and *Cipriano*[2] to oblivion by contending that the cases should be limited only to their factual situation. Appellants argue that the constitutional test of a state's action when depriving a qualified elector of the right to vote in a special election should be tested by the rational basis doctrine because that is

[1]*Kramer v. Union Free School District No.* 15, 395 U.S. 621; 89 Sup. Ct. 1886, 23 L.Ed.2d 583.

[2]*Joseph Q. Cipriano v. City of Houma, Et Al,* 395 U.S. 701, 89 Sup.Ct. 1897; 23 L.Ed.2d 647

the same rule applying to state laws which set voter qualification standards. Appellant contends that the compelling state interest test should not apply to general obligation bond elections and that neither *Kramer* nor *Cipriano* were intended to be precedent setting opinions. The Court should reject this argument. We believe that it is important that the *Kramer* opinion very carefully distinguishes between statutes setting general voter qualification standards and statutes which apply additional requirements as a prerequisite to voting in special elections.

> At the outset, it is important to note what is *not* at issue in this case. The requirements of § 2012 that school district voters must (1) be citizens of the United States, (2) be bona fide residents of the school district, and (3) be at least 21 years of age are not challenged. Appellant agrees that the States have the power to impose reasonable citizenship, age and residency requirements on the availability of the ballot. Cf. Carrington v Rash, 380 US 89, 91, 13 L Ed 2d 675, 677, 85 S Ct 775 (1965); Pope v Williams, 193 US 621, 48 L Ed 817, 24 S Ct 573 (1904). The sole issue in this case is whether the *additional* requirements of §2012 — requirements which prohibit some district residents who are otherwise qualified by age and citizenship from participating in district meetings and school board elections — violate the Fourteenth Amendment's command that no State shall deny persons equal protection of the laws. *Kramer*, 23 L Ed. 2d at 588, 589.

The instant case has been limited solely to the question of whether or not general obligation bonds (as opposed to revenue bonds) may be submitted to a restricted electorate by placing the additional requirement precedent to voting that qualified electors must also be real property taxpayers.

Appellant's argument to return to the rational basis doctrine should be rejected.

The rule enunciated in *Kramer* might best be stated as follows:

While the states need only to show a rational basis to uphold

voter qualification requirements, having once qualified a person to vote under the general voting requirements, the state must then show a compelling reason before it can restrict the exercise of the voter franchise in any given election.

This is a good rule and does not upset past doctrines. It merely guarantees equal vote by all qualified electors except in the properly limited case where the state can show a compelling interest to restrict the vote to a lesser number than all qualified electors.

Secondly, *Cipriano,* paraphrasing *Kramer,* holds that the state, upon showing a compelling interest, must also separate those voting from those excluded so that none of those excluded are as interested as those allowed to vote.[3]

We believe Appellants' position that the Court limit both *Kramer* and *Cipriano* to their facts is not only unwise, it is also bad law. Having set a precedent in clear and certain terms in one year, the Court should not in the next year reverse its course. This is especially true when both *Kramer* and *Cipriano* are examined in the light of the words therein. As we shall show below, there is very little question that *Kramer* was meant to be a precedent setting opinion and *Cipriano* was an application of the *Kramer* doctrine to municipal bond elections.

Appellants state, and we agree, that the basic test of a state statute, vis a vis the United States Constitution, is generally the rational basis of the legislative act. However, the Court has made exception to this rule where certain basic freedoms are involved. That is to say, there are certain basic rights which, when infringed upon by any state act, causes the Court to apply a more stringent test.

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[3]Assuming *arguendo* that a State might, in some circumstances, constitutionally limit the franchise to qualified voters who are also "specially interested" in the election, whether the statute allegedly so limiting the franchise denies equal protection of the laws to those otherwise qualified voters who are excluded depends on "whether all those excluded are in fact substantially less interested or affected than those the statute includes." 23 L Ed at 651

FREEDOM OF MARRIAGE AND PROCREATION

This rule was implied in *Skinner v. State of Oklahoma,* 316 US 535, 86 L Ed 1655, (1942), where the Court struck down a mandatory sterilization statute which applied after the defendant had been adjudged a habitual criminal. A man could not be adjudged a habitual criminal until he was found guilty of three felonies. The law included larceny as one of the crimes which were to be taken into consideration in a determination of the habitual criminal status. On the contrary, the crime of embezzlement was excluded from the list of felonies. Justice Douglas, speaking for the Court, held the crimes of larceny and embezzlement equal in nature and as the right of procreation was one of the basic civil rights of man, it was unconstitutional to apply the policy of sterlization against one act and not to apply it against all acts within the same lines, clearly implying that there was no compelling state reason to allow the state to take this action based on a certain type of criminal act when it didn't take the same action against all acts of equal criminal nature.

FREEDOM OF MOVEMENT

In *Korematsu v. the United States,* 323 U S 214 (1944), 89 L Ed 194, the Court upheld the Japanese relocation statute adopted during World War II. The Court said:

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can, 323 U S at 216.

It is sufficient to say that the Court held World War II a compelling reason to allow the limitation on the defendant's freedom of movement.

RELIGIOUS FREEDOM

In *Braunfeld v Brown,* (1961) 366 U S 599, 6 L Ed 2d 563,

81 S Ct 1144, the Court held that although a Sunday closing law may place restrictions on freedom of religion of those whose religion sets a day other than Sunday as a day of worship, the countervailing feature of the statute giving one uniform day of rest for all of the citizens of the state was sufficiently compelling to allow the court to uphold the Sunday closing law.

However, in *Sherbert v. Verner,* 374 U S 398 (1963), 10 L Ed 2d 965, 83 S Ct 1790, the Court held a state statute relative to unemployment compensation invalid where it refused compensation to a worker (Seventh Day Adventist) who was discharged for refusal to work on Saturday. In this case, the Court stated:

> We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion. We think it is clear that it does. (374 US at 403)
>
> We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation," Thomas v Collins, 323 US 516, 530, 89 L Ed 430, 440. (374 US at 406)
>
> In these respects, then, the state interest asserted in the present case is wholly dissimilar to the interests which were found to justify the less direct burden upon religious practices in Braunfeld v Brown, supra. The Court recognized that the Sunday closing law which that decision sustained undoubtedly served "to make the practice of [the Orthodox Jewish merchants'] . . . religious beliefs more expensive," 366 US, at 605. But the statute was nevertheless saved by a countervailing factor which finds no equivalent in the instant case — a strong state interest in providing one uniform day of rest for all workers. The secular objective could be achieved, the Court found, only by declaring Sunday to be that day of rest. (374 US at 408)

FREEDOM OF ASSOCIATION

In *Bates v. Little Rock,* (1960) 361 US 516, 4 L Ed 2d 480, 80 S Ct 412 the court held that freedom of association was a basic civil right which could not be infringed upon without the state showing a compelling reason. In this case the Court found forced disclosure of membership list in the NAACP under the requirements of an occupational license tax ordinance was violative of the 14th Amendment of the United States Constitution and that a mere rational basis for the ordinance was not sufficient. The state showed no "subordinating interest which is compelling"; the court struck down the ordinance. In this case, the Court said:

> Decision in this case must finally turn, therefore, on whether the cities as instrumentalities of the State have demonstrated so cogent an interest in obtaining and making public the membership lists of these organizations as to justify the substantial abridgment of associational freedom which such disclosures will effect. Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling. (361) US at (524)
>
> It was as an adjunct of their power to impose occupational license taxes that the cities enacted the legislation here in question. But governmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion in the preamble of an ordinance. When it is shown that state actions threaten significantly to impinge upon constitutionally protected freedom it becomes the duty of this court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justifaction. (361 US at 525)

Thus the Court has over the years developed a test relative to the basic personal freedoms. When such basic personal freedoms are restrained by statutes adopted by the states, the claim of rational underpinning is not sufficient to uphold the statutes. The states must show a compelling reason for any limitation which affects such basic freedoms. Since *Baker v. Carr,* (1962)

369 U S 186, 7 L Ed 2d 663, 82 S Ct 691, and the myriad of cases which follow regarding voter rights, there can be no question that the Court now holds that the exercise of the franchise is guaranteed to the electors of the several states and that this right is one of the basic freedoms protected with a scrutiny which requires those defending any limitation or diminution of the exercise of the franchise to clearly show a compelling state interest. This is especially true since the decision in *Avery v. Midland* County, (1968) 390 U S 474, 20 L Ed 2d 45, 88 S Ct 1114, which applies the 14th Amendment to all elections at the state or local level.

> The Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State.
>
> "Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action . . ." Cooper v Aaron, 358 US 1, 17, 3 L ed 2d 5, 16, 78 S Ct 1401 (1958). Although the forms and functions of local government and the relationships among the various units are matters of state concern, it is now beyond question that a State's political subdivisions must comply with the Fourteenth Amendment. The actions of local government *are* the actions of the State. A city, town, or county may no more deny the equal protection of the laws than it may abridge freedom of speech, establish an official religion, arrest without probable cause, or deny due process of law. 390 US at 479, 480

It is thus neither surprising nor unworkable to apply the compelling state interest test to special elections as the Court did in the *Kramer* and *Cipriano* cases and it is clear that the Court intended this rule to be applied to all special elections because the exercise of the franchise is to receive a greater protection because of the nature of the right affected. In *Kramer* the Court stated as much.

> And, for these reasons, the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legis-

lators and other public officials. Those decisions must be carefully scrutinized by the Court to determine whether each resident citizen has, as far as is possible, an equal voice in the selections. 23 L Ed 2d at 589, 590.

But the issue is not whether the legislative judgments are rational. A more exacting standard obtains. The issue is whether the § 2012 requirements do in fact sufficiently further a compelling state interest to justify denying the franchise to appellant and members of his class. 23 L Ed 2d at 593.

The fact that the Court did apply this basic test in *Kramer* and immediately restated the same test in *Cipriano* is a clear indication that the cases were meant to be precedent setting.[4] Also the words themselves clearly imply that the cases were to affect all elections and not be applied only to a third-class school district in New York and city utility revenue bonds and that all other special elections were to be judged by some other standard. Therefore, we submit the following portions of the *Kramer* and *Cipriano* cases as evidence that the rules contained therein were clearly to be applied to all special elections.

And, in this case, we must give the statute a close and exacting examination. "[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." Reynolds v Sims, 377 US 533, 562, 12 L Ed 2d 506, 527, 84 S Ct 1362 (1964). See Williams v Rhodes, supra, at 31, 21 L Ed 2d at 31; Wesberry v Sanders, 376 US 1, 17, 11 L Ed 2d 481, 491, 84 S Ct 526 (1964). This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government. Kramer v. Union Free Sch. Dist., 23 L Ed 2d at 589.

Whether classifications allegedly limiting the franchise to those

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[4]This is especially important when it is noted that the lower Court upheld the Louisiana statute in *Cipriano* on the theory of rational basis. 286 F. Supp. 823, at page 826.

resident citizens "primarily interested" deny those excluded equal protection of the law depends, inter alia, on whether all those excluded are in fact substantially less interested or affected than those the statute includes. In other words, the classifications must be tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goal. Kramer v. Union Free Sch. Dist., 23 L Ed 2d at 592. The challenged statute contains a classification which excludes otherwise qualified voters who are as substantially affected and directly interested in the matter voted upon as are those who are permitted to vote. When, as in this case, the State's sole justification for the statute is that the classification provides a "rational basis" for limiting the franchise to those voters with a "special interest," the statute clearly does not meet the "exacting standard of precision we require of statutes which selectively distribute the franchise." Cipriano v Houma, 23 L Ed at 651, 652.

There is simply no rational reason in light of the foregoing to limit either *Kramer* or *Cipriano* to the facts contained therein.

II.

In Part II Appellants shift their thrust to argue that even if *Kramer* and *Cipriano* do apply to elections such as the City of Phoenix general obligation bond election, the City meets the test set forth in those cases and the election should be upheld.

This case concerns an election held in the defendant City seeking authorization to issue various bonds of the City of Phoenix. Two of the questions submitted to the electorate related to municipal revenue bonds (airport and water utility). The defendants have heretofore conceded that the revenue bond portion of the election is invalid because the election was restricted to real property taxpayers and not open to all qualified electors of the City.

The constitutional and statutory provisions are correctly set forth in Appellants' Jurisdictional Statement and need not be restated here. The main Arizona constitutional provision is Article 7, Section 13, which requires all questions on bond issues to be submitted to the real property taxpaying electors. This constitu-

tional provision has been held to apply to general obligation bonds but not to revenue bonds;[5] hence Appellants concession on the revenue portion was not inconsistent with their present stand on general obligation bonds.

The bond enabling statute under which Appellant sought authorization for issuance of the general obligation bond portion of its election is set forth in Title 35, Article 3, Section 3, Arizona Revised Statutes (a portion of this statute was ruled unconstitutional in the lower court's judgment).[6] It is important to note that the bond enabling statute is one of general application relating to the issuance of ad valorem tax supported bonds in the State of Arizona. It is in general the vehicle used for the issuance of most general obligation bonds in the state. The same general act is used by cities, towns, counties, school districts and all special districts unless the special district has its own integral bond enabling legislation.

The offensive portion of Title 35, Article 3, Section 3, Arizona Revised Statutes, is found in Section 35-455 (A).

§ 35-455. Issuance and sale of bonds; call for election

A. When the political subdivision designated in this article desires to issue bonds or other evidences of indebtedness, the governing body or board thereof may, with assent of a majority of the real property taxpayers who are qualified electors therein voting at the election held as provided by § 35-454, issue and sell bonds in the amount authorized at the election.

Similar language is contained in all other general obligation bond statutes within the State of Arizona. Hence, the effect of the

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[5] *Arizona State Highway Commission v. Gary Nelson, Attorney General,* 459 P.2d 509

[6] The Judgment reads as follows: "IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that . . . and Title 35, Section 455, Arizona Revised Statutes; are violative of the 14th Amendment of the United States Constitution insofar as said sections of the Constitution of the State of Arizona and statutes of the State of Arizona restrict elections to real property taxpayers who are qualified electors of the subdivision."

lower court's opinion effectively declared unconstitutional all general obligation bond statutes in the state "insofar as they exclude otherwise qualified electors from voting in the election."

In their Opening Brief, the Appellants entire basis for reversal of the lower court's opinion is the distinction between revenue bonds (as a generic term not necessarily limited to utility revenue bonds of the type mentioned in *Cipriano*) and general obligation bonds. There is a distinction, we agree, between the two types of bonds, but as we will show, the differences are not substantial enough to constitute a distinction of constitutional proportions.

It is important that we state the general distinction between revenue bonds and general obligation bonds. A revenue bond is sold and the proceeds are used to construct a revenue producing facility and the revenues received from the use of the facility are pledged for the repayment of the bonds. Generally, but not always, the facility must be self-supporting and the debt service on the bonds is paid after the operation and maintenance expenses of the facility.[7] Examples of revenue bond financing range from such gigantic operations as the New York Port Authority, Tri Borough Bridge Authority, the Golden Gate Bridge and mass transit operations such as the Bay Area Rapid Transit in San Francisco and are also used for local utility services such as power, water and gas utilities. We will also find that airports and athletic stadiums are usually constructed through the vehicle of revenue bonds.

Conversely, a general obligation bond is not sold with the intent of constructing a revenue producing facility nor is it necessary that there be any revenue from the project because the issuing body pledged funds to be received from ad valorem tax

[7]Certain type revenue bonds of the modern vintage use the so-called gross pledge which pledges the gross revenues of the district's revenue producing facilities. The bondholder is then paid first and the operation and maintenance charges are paid after the annual debt service on the bonds. If the revenues are not sufficient, the district must go to a tax levy or appropriated money from some other sources to pay the operation and maintenance costs. An example of this form of financing is the State Junior College Revenue Bonds, Section 15-696.01 and following, Arizona Revised Statutes.

(direct property tax) to be levied uniformly on all the taxable real property within the issuing district for debt service on the bonds.[8] Generally an Interest and Redemption Fund are to be set up and the issuing corporation will unqualifiedly pledge the proceeds received from the levy of taxes to the payment of the bonds. In Arizona, the Court has held that the bond holder is not allowed to look beyond the promise to pay the bonds by the levy of a direct ad valorem tax, that the sole security for the bonds is the levy of the ad valorem tax. However, the Court went on to hold that that opinion does not in any way stop the issuer from using any other funds legally available to service the bonds.[9]

Some special districts have hybrid forms of bonds pledging revenues of the district with a guaranty to fund the bonds from tax sources if the revenues fall short. See, for example, the Arizona law regarding hospital districts, Section 36-1242, Arizona Revised Statutes.

There are other types of municipal indebtedness such as short term warrants and long term lease purchase plans but revenue bonds and general obligation bonds make up the great bulk of the bond market. Of the two forms of bonds, general obligation bonds are by far the most prevalent. In Arizona the prevailing budget laws and constitutional debt limitation make general obligation financing the only source for raising large sums of money necessary for construction of new schools and municipal improvements.

It is further noted that two important stipulations obtain in this case. First, it has been agreed between the parties that Miss Kolodziejski's landlord will take the cost of real property taxes into consideration as a factor in determining her rent and secondly, Miss Kolodziejski is interested pecuniarly in the outcome of the election and is an interested citizen of the City of Phoenix wishing to take part in the civic affairs of the city and vote in all muni-

[8]See *Baker, Watts v. Saxon,* 261 F. Supp. 247, at page 252.

[9]*Allison v. City of Phoenix,* 44 Ariz. 66. at page 77, 33 P.2d 927.

cipal elections. In a sense, the Appellee is every person who rents property. It is beyond belief that the tenant does not effectively pay the cost of real property taxes borne by her landlord. It is further beyond the realm of common sense to believe that in every election there is not one qualified elector not a real property taxpayer "who will be as interested" in the outcome of the election just as and in the same manner as Miss Kolodziejski is interested. Therefore, we submit that the compelling state interest the State of Arizona seeks to articulate and protect by the limitation of the electorate to real property taxpayers is not a valid reason and is constitutionally impermissible.[10]

On of the main points in Kramer was that the electors voted on the district budget to be raised by a tax on real property. We see no difference here. The bonds require such tax. The only difference is that the period of time the bonds are to run is longer than an annual operating budget of a school district, but this is only a matter of degree.

It is further noted that Appellee pays excise taxes to the City of Phoenix and that a great portion of the annual debt service on the bonds has been paid through the vehicle of excise taxes. From every standpoint Appellee is both interested in and affected by this election. The lower Court, in applying the compelling state interest and substantial interest test, ruled there was no distinction between general obligation bonds and revenue bonds. This is a proper opinion and should be upheld by this Court. The Appellants' argument in the lower Court stated that the interest the State sought to promote was to protect the propery owner from the indiscriminate piling of debt against the property by those not required to pay the tax and that the restriction of the election sought only approval for the issuance of the bonds

[10]Actually the real property taxpayers true protection is the Arizona State constitutional debt limitation (Article 9, Section 8, State Constitution) which limits the debt to 4% of the value of the taxable property for general purposes and 15% for water, sewer and lights. This limitation has been held to apply to assessed valuation and hence constitutes only a percentage of the actual value of the property assessed. See Note 12.

from those persons actually primarily responsible for their payment. In a sense, Appellants argue, it is surely fair play to have those liable for the payment of the bonds make the actual determination as to whether the generally elected legislative body shall have authorization for issuance of the bonds.

Thus, Appellants argue that this being a compelling state interest, it is therefore within the bounds of the *Kramer* test to eliminate from the election all persons who are not property taxpeyers because they are not ultimately responsible for the payment of the bonds. This form of reasoning was not met with favor in the lower Court; it should not be favored here. The Appellants' argument is actually no different than the one set forth by the City of Houma stating that the property owner has a special pecuniary interest in the property and property value. The Appellants have not actually shown that those allowed to vote have any greater interest in the public improvements to be constructed from the proceeds of the bonds. In fact, it is admitted that Appellee is interested in the affairs of the City (Agreed Statement of Facts, Paragraph 5) and, as we have seen, she met the test for subjective interest or pecuniary interest. Furthermore, as we have shown, any increase in the real property taxes paid by Appellee's landlord will be reflected in her rent, thus passing the effect of any increase on to the Appellee. The Court, in the *Kramer* case, seemed to imply that the test of interest was a subjective one, that a person should be allowed to vote if he was interested in the affairs of the district. Appellee clearly pases this test, by stipulation. She further passes the test of pecuniary interest. Further, as pointed out by Justice Stewart in his dissent in *Kramer,* the term "interest" seems to be so broad as defined by the Court in the majority opinion that Appellee's mere desire to vote would be sufficient.[11]

The Stipulation of Facts shows that the cost of taxes paid by the landlord will be passed on the the Appellee. However, the present tax structure in the State of Arizona weighs more heavily

[11]Kramer dissent, 23 L Ed 2d at 597.

against Appellee than against a residential homeowner (which, of course, constitute the majority class of people allowed to vote in the election). A residential homeowner pays taxes assessed at 18% of the cash value of the property while an apartment owner pays tax which is based on 25% of the cash valuation of the apartment property.[12] As it is stipulated that the landlord's tax is passed on to the tenant, the Appellee is actually more affected by any increase in the ad valorem taxes than the residential homeowner who is the main class of person allowed to vote in the election.

Further the Appellee and all qualified electors pay a major portion of the debt service on Appellants' general obligation bonds from sales taxes. Although it is clearly optional on the part of the City, this shows that the Appellee can and probably will be charged a portion of the debt service on the general obligation bonds through the vehicle of sales taxes.[13] Clearly all persons who live within the City of Phoenix will have to pay the city's sales tax.

Appellee thus stands as a qualified elector clearly interested in and affected by the results of the Appellants election. The general obligation bond vehicle is the main source of capital funds for the City of Phoenix, and Appellee is just as needful of the civic improvements as her neighbors. The only distinction is that the neighbor may own property and pay taxes thereon. Thus we have a situation which is basically unfair. We have a situation where the Appellee is as interested as some real property taxpayers within the City. It probably would not be hard to find a real property taxpayer who owns a very small parcel of land and pays a very small amount of tax each year.

Here are some examples of the basic unfairnesses which may result.

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[12]Section 42-227, Arizona Revised Statutes, as amended; Section 42-136, Arizona Revised Statutes, as amended.

[13]Stipulation of Facts, Paragraph 10 thereof, shows that more than 50% of the debt service on the city's general obligation bonds came from sources other than ad valorem taxes.

1. A qualified elector could lease hundreds and hundreds of acres of land and effectively pay the tax through the medium of rent and not be allowed to vote in the election while another qualified elector could own one-square inch of taxable property and pay a few cents each year in taxes and have the unrestricted right to vote in the elections thus running up the cost of the debt service only to have this cost applied to the lessee of realty (keeping in mind that the articulated state interest is to prevent the converse of this situation).

2. One person may be the owner of all the real property in a political subdivision. Schools and municipal improvements may be needed to serve the population but the single real property taxpaying elector may refuse to vote for the needed bonds. This, of course, is pure feudalism. However, this type of situation is not beyond the realm of thought.[14] As a matter of fact, one man once claimed ownership of all of central Arizona, including the land where the City of Phoenix is now located, through a Spanish land grant in the name of his wife.[15] His claim was proven fraudulent but it clearly raises the possibility of an area of one million people or more not being able to make one improvement without the consent of a ruling family.

Arizona is still a frontier state in the sense that we have only two population centers in the sixth largest state in the Nation. Great areas of the state are sparsely populated. Company towns exist where all the real property is owned by a mining company (for example, Morenci). Fee land exists as islands in Indian

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[14]In the Peach Springs School District, Mohave County, Arizona, a general obligation bond election was defeated. 0 aye, and 1 nay. Source: Official canvass of the results of the election. The Appellee's attorney acted as bond counsel for the school district. We were informed that the single voter was the only real property taxpayer who was also qualified to vote.

[15]"*The Peralta Grant; James Addison Reavis and The Barony of Arizona*", by Donald Moore Powell, 1960, University of Oklahoma Press, Norman, Oklahoma.

Reservations. Often this fee land is owned by one family or one person, as in the instance of Peach Springs School District.

Obviously, these examples can apply to any state with similar restrictions. For the foregoing reasons, the lower Court's opinion should be affirmed.

Various commentators have discussed the problem raised by the *Kramer* and *Cipriano* decisions. The University of Pennsylvania Law Review, Vol. 117 at page 599 admits the property holder may have some more permanent interest "in the outcome of the election, but this crude generalization is a tenuous basis for an exclusion 'close to the core of our constitutional system.'"

In the Michigan Law Review, Volume 67, page 1260 at page 1265, we find the following:

> "In a case where financing involved increased property taxes, it might be argued that property owners would indeed be more likely to vote responsibly than those who do not own property. Nevertheless, when it is recognized that a property tax is generally not paid by property owners alone but is also passed on to the tenant, this argument becomes questionable. Without the assumption that property owners alone pay the property tax, there is no fundamental differences between property owners and non-property owners that would make the former more likely to vote responsibly in such an election. In short it is impossible to find any significant connection between the ownership of real property and the ability to exercise the franchise intelligently and responsibly."

and at page 1266 we find the following:

> "The property ownership requirements might still be justified, however, if it served to separate citizens with a substantial interest in the outcome of the election from those whose interest is not substantial. If the outcome of an election affects property owners alone or if it affects them to a substantially greater degree than it does others, property ownership qualifications do not violate the equal protection clause. But, it is clear that when the issue at stake in the election affects all citizens in much the same manner and degree, restricting the class of voters to property owners is arbitrary and can be unconstitutional."

and in Volume 87, No. 7, Harvard Law Review, at page 80, the commentator states:

> "A significant result of this reading of Kramer is that property qualifications simpliciter may no longer be acceptable eligibility test in such traditional areas as school millage or sewer assessment elections."

III

Appellants have taken the position that any decision by this Court should be prospective. Appellants' last contention is that the cut-off date for *Cipriano* should be the date of the city's election, and therefore, the election having been held prior to *Cipriano,* the theory of *Cipriano* in no event should apply to the city's bond election. We believe the Court should reject this back door approach to validation of the city's election. *Cipriano* was clearly prospective and would not apply where the authorization to issue the securities was legally complete on the day of the decision. However, the term "legally complete" clearly means the date of the canvass after which a certificate of result is recorded. Section 35-454, Arizona Revised Statutes, states "upon filing and recording the certificate the governing board or body shall carry out the purposes of the election." As we have set forth in Part I of this Brief, the Court in both *Kramer* and *Cipriano* ennunciated the doctrine which was to be applicable to all elections. It appears to us that any prospective application of any decision in this case would be based entirely upon the further discretion of this Court. Appellee, however, is sympathetic with the position of the various amici and therefore suggests that in order to prevent the disastrous results claimed by the Attorney General of the State of Texas that the Court rule that the general application of any decision rendered in this case be made prospective. Even though the subdivisions in the State of Texas may have disregarded the plain warning in the *Cipriano* case, the countervailing equities clearly favor that no action be taken to invalidate any bonds which have been issued under an erroneous reading of *Cipriano.*

SUPPLEMENTAL BRIEF

After submitting this brief to the printers and having received final proofs thereon, Appellee learned of the decision of the United States District Court for the Eastern District of Louisiana, New Orleans Division, in the case entitled *Frank T. Stewart, et al, Petitioners vs. The Parish School Board of the Parish of St. Charles, and School District No. 1 of the Parish of St. Charles,* No. 69-2818, Section E.

That decision like the instant decision was handed down by a three-judge panel.

The decision handed down by Judge Wisdom, Circuit Judge, declared invalid the constitutional and statutory provisions of the State of Louisiana restricting those voting in general obligation elections to property taxpayers. The Stewart case related to school bond elections but the court's decision clearly turned on the ability of the qualified elector to vote on general obligation bond elections and that there was no constitutional distinction between the qualified elector and the property taxpayer. Judge Wisdom cited from the case of *Turner v. Fouche,* decided January 9, 1970, reported in 38 Law Week 4090, and relied upon the statements in the *Turner* case to the effect that "what other objectives Georgia seeks to obtain its freeholder requirements must be secured, in this instance at least, by means more finely tailored to achieve the goal.".

Judge Wisdom noted that the fact that the school bonds are paid from ad valorem taxes is not a sufficient distinguishing feature. "True, the school bonds are secured by ad valorem taxation. Property taxpayers are faced with additional taxes for the years authorized by the bond issue; they are subject to having a lien on their property for the life of the issue. But if protection of the property taxpayer had been the legislature's chief interest, the law would not have excluded business entities. These are the taxpayers who pay the largest share of taxes in most voting districts."

Finally, Judge Wisdom stated:

> "It is conceivable that in a small rural school district a handful of taxpayers would have the veto power over public school improvements. In any voting district, the small homeowner would have his vote diluted. At this point in history, this is an intolerable discrimination. In short, we hold in favor of the plaintiffs on both issues. The special interest property taxpayers have in bond elections is not the compelling State interest that would justify excluding a large portion of the electorate that has a substantial stake in public education."

Respectfully submitted,

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